No. 14,760

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK SHOWELL AND DOROTHY SHOWELL, *Petitioners,* vs COMMISSIONER OF INTERNAL REVENUE *Respondent.*	}

PETITION FOR REHEARING EN BANC

W. LEE MCLANE, JR.
NOLA MCLANE
806 Security Building
Phoenix, Arizona
Counsel for Petitioners

MCLANE & MCLANE
806 Security Building
Phoenix, Arizona
Of Counsel

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To the United States Court of Appeals for the Ninth Circuit:

Petitioners respectfully petition for a rehearing *en banc* and as their reasons therefore assign the following:

I

A serious difference as to the relief to be accorded petitioners is reflected by the two opinions written by Judges Chambers and Pope, respectively.

II

The rule of law set forth in the Tax Court's opinion that conclusive proof is required before a taxpayer has carried his burden of proof can be said to be affirmed by the majority opinion herein. It is true that the paragraph beginning at the bottom of page 8 of the opinion of Judge Chambers indicates otherwise. However, the language on page 7 which supports the opinion of Judge Withey refutes such a conclusion being drawn from the paragraph at page 8 because Judge Withey's opinion required conclusive proof since it showed clearly his position that it was impossible for the petitioners to carry their burden of proof.

In view of the statement by respondent's counsel at the trial that this was "somewhat of a test case," (R. 39) petitioners submit that the Tax Court consciously required "conclusive proof" rather than proof of the facts by a "preponderance of the evidence," *Schilling Grain Corp.*, 1927, 8 B.T.A. 1048, such as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money, *Burnet v. Niagara Falls Brewing Co.*, 1931, 282 U.S. 648, 51 S. Ct. 262, 75 L. Ed. 594. Thus, it was no accident that the facts were written as they were, and it may be argued that the majority opinion herein does not reverse the Tax Court on this rule of law requiring conclusive proof.

III

The Tax Court specifically found as fact the exact manner in which Exhibit 3 was made. Therefore, it found that the losses and gains incurred daily were recorded on that exhibit. Such a finding requires the conclusion that the losses should have been allowed. The decision of the Tax Court that the losses were less is contrary to its own findings of fact and should be reversed with directions to enter judgment for petitioners. This is particularly true since the record is completely lacking in evidence that the method of recording gains and losses was inaccurate or that there were inaccuracies in the exhibit, and since there is no finding of fact that the losses did not occur. After all, it was the Tax Court

itself which made the following findings under the designation "Findings of Fact":

> "After a game had been played, the petitioner examined the slips of paper and tally sheets for winners and losers. He marked winning bets with a circle and entered the amount to be paid to the bettor. He marked losing bets with an 'X'. At the end of the day, if a baseball or basketball game was involved, or at the end of the week if a football game was involved, the petitioner would read to Houston L. Walsh, who shared an office with the petitioner, the amounts entered on the slips of paper and the tally sheets to be paid to winning bettors and Walsh added them on an adding machine. A similar procedure was followed for determining the amount of the losing bets. When the totals of both were obtained, a similar procedure was followed with Walsh reading to petitioner from the slips of paper and tally sheets and petitioner operating the adding machine. After the foregoing procedures had been gone through, *entries,* as follows, *were made on a sheet of columnar paper,* entitled 'SPORTS — 1949' and *submitted in evidence as* petitioner's *Exhibit 3.* If the total of the amounts of the bets by losing bettors exceeded the total of the amounts to be paid to winning bettors, the amount of the excess was entered on Exhibit 3 in a column under the heading 'Gain.' If the total of the amounts to be paid winning bettors exceeded the total of the amounts of the bets by losing bettors, the excess was entered on Exhibit 3 in column under the heading 'Loss.' *The entries made on Exhibit 3 from January 1 to December 7, 1949, were made by Walsh. The other entries made on the exhibit were by the petitioner.*
>
> "Petitioner's Exhibit 3 shows the following:" (Emphasis supplied)

IV

The fair import of the majority opinion is that the Tax Court will be sustained if it finds that the testimony of both petitioner and Walsh was unsatisfactory, on the theory that the left hand figures (Gain) are admissions against interest. It is very respectfully submitted that the evidentiary concept of "admissions against interest" does not apply to one-half of a document any more than it applies to one-half of a statement. As best stated in 1 Jones On Evidence 553, 554 (4th ed. 1938):

> "Where one party offers the books or a statement of account furnished by the other party, for the purpose of showing admissions, it has frequently been held that he renders admissable those items which are favorable as well as those which are adverse to such other party. The one offering such an account as an admission cannot have the benefit of the credits *without also submitting to the debits.*" (Emphasis supplied).

If this Court sustains the Tax Court on the principle that only one-half of a document or permanent record constitutes an admission against interest, there is not a set of books and records in the United States which will not support a deficiency in tax impossible of refutation. Surely there must be some evidence offered by the Commissioner that the loss column is inaccurate. If not, then a taxpayer is required to carry the burden of proof by conclusive proof.

CONCLUSION

For the reasons set forth above, petitioners respectfully submit that their petition for a rehearing *en banc* should be granted and that the judgment of the Tax Court should be reversed and the case remanded with directions to enter judgment for petitioners.

Respectfully submitted,
W. Lee McLane, Jr.
Nola NcLane

Dated November 6, 1956 *Counsel for Petitioners*

CERTIFICATE OF COUNSEL

W. Lee McLane, Jr. and Nola McLane certify hereby that they are counsel for the petitioners herein; that they make this certificate in compliance with rule 23 of this Court; that in their judgment this petition for rehearing is well founded and is not interposed for delay; that copies of this petition have been duly served by petitioners upon counsel for the respendent.

W. Lee McLane, Jr.
Noea McLane

Dated November 6, 1956